U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 04 September 2003

CASE NO. 2002-LHC-1913

OWCP NO. 18-72245

In the Matter of :

DAVID BECKWITH,
Claimant,

v.

SOUTHWEST MARINE, INC.,
Employer,

and

WARD NORTH AMERICA, INC.,
Carrier.

Preston Easley, Esq.
For the Claimant

Daniel F. Valenzuela, Esq.
For the Employer and Carrier

Before: Anne B. Torkington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, (hereinafter referred to as "the Longshore Act" or "the Act"). A trial on the merits of this claim was held in Long Beach, California, on November 18, 2002. Both the claimant and the employer were represented by counsel. During the trial, the following exhibits were admitted into evidence: Administrative Law Judge Exhibits (AJX) 1-3 (pre-trial statements of the claimant, the employer, and the District Director, OWCP, in that order), Claimant's Exhibits (CX) 1 to 22, and Employer's (Respondent's) Exhibits (EX)1-15.

A numer of exhibits were submitted after the hearing. On November 21, 2002, the claimant submitted a supplemental exhibit of two pages with his calculation of the average weekly wage; the employer stipulated to the accuracy of the calculations on page 2 of the exhibit; that exhibits is hereby admitted as Joint Exhibit ("JX") 1. On April 29, 2003, perpetuation depositions were completed and the transcripts submitted, for Larry D. Dodge, M.D. (EX 16) and Kelly Jon Coyne (EX 15), and are hereby admitted into evidence. The parties submitted Closing Briefs on June 12, 2003; the claimant's brief is hereby admitted into evidence as ALJX 4 and the employer's brief is hereby admitted into evidence as ALJX 5. In response to the court's Order to Show Cause issued on August 19, 2003, the Director, OWCP submitted its Response which is hereby marked as ALJX 6 and admitted to the record.

SUMMARY OF EVIDENCE

The subject of this claim is an industrial injury the claimant suffered on December 7, 1999.

The claimant is forty-nine years old and has a high-school education. Tr. at 23. He began working for the employer in 1979, and at the time of the subject work injury, the claimant worked as a pipefitter/leadman. CX 6 at 6, CX 9 at 15. The physical requirements of this position, as reported by the claimant to his doctors, include sitting, standing, squatting, crawling, climbing, twisting, lying down, reaching overhead, bending, stooping, and occasional heavy lifting. CX 10 at 61-62, EX 14 at 194.

The claimant suffered from a prior injury to his back. CX 13 at 91. On January 24, 1995, the claimant strained and twisted his back while lifting a 100 pound manifold up a flight of stairs. CX 13 at 91-92. Dr. Larry D. Dodge, board certified orthopedic surgeon, provided initial treatment to the claimant, who denied having had any previous back injuries. EX 16 at 6; CX 13 at 92. The claimant remained in conservative care and returned to work under unspecified work restrictions. On February 21, 1995, the claimant suffered an aggravation of his back while using a chain saw. The claimant was placed on temporary total disability and began a course of physical therapy. *Id*. On March 13, 1995, the claimant returned to work for three months in a modified capacity and thereafter resumed his regular duties. CX 14 at 98. The claimant was eventually promoted to foreman, a position which entailed mostly supervisory duties and only occasional physical work. CX 14 at 98.

On January 22, 1996, the claimant was referred to Dr. Anthony Macarian. CX 14 at 96-107. Dr. Macarian opined that the claimant suffered from a lumbosacral strain which produced a herniated disc at L4-5, and which resulted in right lumbar radiculitis. CX 14 at 103. Dr. Macarian reported that the claimant's back condition was permanent and stationary. Nevertheless, Dr. Macarian noted that further evaluation was necessary and ordered an MRI scan of the claimant's back. That same day, the claimant underwent an MRI scan which revealed "a small to moderate-sized right lateral disk protrusion which extends into the right neural foramen and contacts the right L4-5 nerve" and a "[s]mall left paracentral disk protrusion" at L1-2. EX 15 at 108-09.

On January 8, 1999, Dr. Dodge examined the claimant, who reported lower back pain and occasional right leg pain, symptoms which were aggravated upon repetitive bending, stooping, or lifting. CX 13 at 91-95. Dr. Dodge found normal results based on his physical examination, and a moderate-sized right lateral disc protrusion on the L4-5 level based on a roentgenograph. Dr. Dodge diagnosed a lumbosacral strain and a small lumber disc herniation at L4-5. Dr. Dodge opined that the claimant suffered a five percent impairment of the whole person under the Fourth Edition of the AMA Guidelines of Permanent Impairment based on his back condition and that the condition was permanent and stationary. Dr. Dodge released the claimant back to his regular work with restrictions on "very heavy work."

Based on the claimant's injury of January 24, 1995, the claimant received $19,536.76 for temporary total disability compensation under a settlement pursuant to Section 8(i) of the Act. EX 6 at 138.

On December 7, 1999, the claimant injured his back while jumping from a ship at work. Tr. at 24-25, CX 1 at 1, CX 5 at 5, CX 7 at 8-10, CX 8 at 11.

On December 8, 1999, Dr. Alex K. Han provided the initial treatment for the claimant's injury. CX 8 at 12. Dr. Han noted the claimant's history of lower back strains and chronic symptoms related to this condition. Based on the examination, Dr. Han diagnosed the claimant with "acute lumbosacral strain, r/o lt sciatica." The claimant was discharged with restrictions from performing his usual work. That same day, the claimant submitted to the employer a report of the accident. CX 5 at 5.

On December 10, 1999, the claimant was examined by Dr. Dodge, who noted the claimant's lower back pain with symptoms extending into the lower extremities. CX 8 at 14. Dr. Dodge recorded an impression of "lumbrosacral strain" and noted the claimant's "documented pre-existent lumbar disc herniation at L4-5."

In a letter to the carrier, dated that same day, Dr. Dodge reported this impression and described the claimant's past medical history as "significant for a prior lower back injury sustained at Southwest Marine on January 24, 1995. As a result of that injury he was diagnosed as having a small herniated disc at L4-5." CX 9 at 16. Dr. Dodge described the claimant as experiencing a "moderate amount of pain in the back and intermittent radiating pain into the legs bilaterally." *Id*.

On December 17, 1999, Dr. Dodge again examined the claimant, who reported moderate pain in his back and pain extending into his legs. EX 1 at 7. Dr. Dodge recommended a short course of physical therapy and use of anti-inflammatory and pain medications.

On January 7, 2000, Dr. Dodge examined the claimant and prepared a report for the carrier. CX 9 at 20-21. Dr. Dodge noted the claimant's moderate amount of back pain and occasional pain extending into his legs.

On January 14, 2000, the claimant underwent an MRI scan. CX 16 at 110-17. Dr. David Buckley interpreted the scan and concluded that the claimant suffered from a "moderately large central disk protrusion at L4-5."

On January 21, 2000, Dr. Dodge again examined the claimant and prepared a report to the carrier. CX 9 at 22-23. The claimant's symptoms had not changed, Dr. Dodge noted, and a review of an MRI scan indicated a large herniation at L4-5 "causing significant compression of the nerve roots." Dr. Dodge discussed with the claimant the possibility of surgery, but recommended that he continue conservative treatment.

On February 4, 2000, the claimant returned to Dr. Dodge, who prepared a report to the carrier. CX 9 at 24-25. Dr. Dodge noted the claimant's reports of increasing symptoms of back pain and radiation into both legs. Dr. Dodge allowed the claimant to continue with restricted work.

On February 11, 2000, Dr. Dodge again examined the claimant and prepared an additional report. CX 9 at 26-28. Dr. Dodge noted the claimant's reports of continued moderate pain in his back, radiation into the legs, and difficulty performing light duty work. At this point, Dr. Dodge deemed surgery to be a reasonable treatment.

On February 18, 2000, the claimant returned to Dr. Dodge. CX 9 at 29-30. In his report, Dr. Dodge noted that the claimant's symptoms were unchanged and that surgery was still recommended.

On February 21, 2000, Dr. Dodge performed back surgery on the claimant which included a lumbar laminectomy and fusion. CX 9 at 31-32.

On February 25, 2000, the claimant returned to Dr. Dodge because he was concerned that his bone graft had moved since the surgery. CX 9 at 33-34. Dr. Dodge noted a negative straight leg test and that a roentgenopraph scan did not show that the bone graft had moved.

The claimant then began to develop right radicular pain, Dr. Dodge reported, and by March 10, 2000, a roentgenopraph and a MRI scan revealed that the claimant's bone graft had indeed moved. CX 9 at 37, CX 17 at 118-32. On March 13, 2000, Dr. Dodge performed revision laminectomy surgery on the claimant which included a revision and reinsertion of the bone graft. CX 9 at 35-36, 39-40.

On March 30, 2000, the claimant was examined by Dr. Dodge, who was concerned about the shifting of his bone graft and provided the claimant with a new back brace. EX 1 at 33.

On April 5, 2000, at Dr. Dodge's request, the claimant underwent an additional MRI scan. EX 1 at 34-35, CX 18 at 133-45. Dr. Eric Lizerbram interpreted the scan and noted the following conclusions: (1) "[m]anipulation of the right intervertebral spacer at the L4-5 level. The right spacer is now located within the disk space. However, the left spacer has migrated posteriorly and now deflects the descending course of the left L5 nerve root." (2) "[m]ild enhancing granulation tissue within the lateral recesses at the L4-5 level surrounding the descending segments of both L5 nerve roots," (3) "[n]ew postoperative seroma within the right laminectomy site at the L4-5 level," and (4)

"[p]ersistent chronic right paramedian disk bulge at the L5-S1 level which deflects the descending segment of the right S1 nerve root." EX 1 at 35.

On April 11, 2000, the claimant returned to Dr. Dodge, who prepared a report to the carrier. CX 9 at 41-42. Dr. Dodge found no nerve root compression, but remained concerned that the bone graft may have migrated slightly and appeared to be abutting against the nerve.

On May 5, 2000, Dr. Dodge examined the claimant, who was not showing any radicular symptoms and his graft appeared to have stabilized. CX 9 at 43-44. Dr. Dodge noted that the claimant would remain totally disabled over "the next couple of months."

On May 26, 2000, Dr. Dodge again examined the claimant, who reported intermittent back pain, but no radicular symptoms. CX 9 at 45-46. Dr. Dodge recommended continued use of a brace and opined that the claimant's graft would "mature satisfactorily."

On June 14, 2000, the claimant was examined by Dr. Dodge. CX 9 at 47-48. Noting that the claimant remained "frightened" about his recovery, Dr. Dodge interpreted normal results on diagnostic tests and satisfactory x-rays. Dr. Dodge recommended that the claimant continue using a back brace and engage in only limited activity.

On July 26, 2000, Dr. Dodge again examined the claimant, who reported back pain and but no radicular symptoms. CX 9 at 49-50. Diagnostic tests were normal, Dr. Dodge opined, and he asked the claimant to refrain from bending, twisting, and lifting.

On August 25, 2000, the claimant returned to Dr. Dodge. CX 9 at 51-52. Dr. Dodge noted the claimant's reports of gradually reduced pain along with slight tenderness in the lower lumbar area. Dr. Dodge noted that the claimant's x-rays appeared excellent and that the graft was healing, but that it was still too early to begin back exercises.

On September 26, 2000, Dr. Dodge examined the claimant, who reported low back pain, right buttock, and proximal thigh pain. CX 9 at 53-54. Dr. Dodge noted that all diagnostic tests were normal and that the claimant's fusion was maturing slowly. Dr. Dodge recommended continued use of a brace and limited activity.

On October 26, 2000, the claimant returned to Dr. Dodge. CX 9 at 55-56. Dr. Dodge found that the claimant's graft was stable, but he was not convinced that the graft was solid. At this point, Dr. Dodge recommended that the claimant begin aquatic therapy in order to strengthen his back.

On November 28, 2000, Dr. Dodge again examined the claimant, who reported intermittent back pain and numbness into his right leg. CX 9 at 57-58. A roentgenograph appeared "excellent," Dr. Dodge opined, and the claimant's fusion was maturing. Dr. Dodge recommended continued aquatic therapy and anticipated permanent and stationary status within two months.

On January 17, 2001, Dr. Dodge examined the claimant, who reported pain, predominately in the back, no leg pain, but some right leg numbness. CX 9 at 59-60. Diagnostic tests were negative, Dr. Dodge noted, and the claimant was approaching a permanent and stationary level.

On February 2, 2001, the claimant filed a claim for compensation. CX 1 at 1.

On February 13, 2001, the claimant was examined by Dr. Sidney H. Levine, a board certified orthopedic surgeon. CX 10, at 61, CX 11 at 83. On March 5, 2001, Dr. Levine prepared a report based on this examination. CX 10 at 61-70. During the examination, the claimant complained of dull low back pain, sharp back pain with walking and standing, pain in the buttocks and posterior thighs, occasionally down to the ankle, and numbness in the right thigh. Based on a review of x-rays, medical records, and his physical examination, Dr. Levine found that the claimant was "temporarily totally disabled." Dr. Levine referred the claimant for a CT scan and for an evaluation by a neurologist to determine whether the claimant had "pseudoarthrosis."

On March 13, 2001, the claimant underwent a CT scan of his lower back. CX 19 at 145-63. Dr. Buckley again interpreted the scan and noted "[p]ostoperative changes at L4-5" and "mild calcified right paracentral disk protrusion, causing mild posterior displacement of the right traversing S1 root."

On April 26, 2001, the claimant attended a neurological consultation performed by Dr. Isaac Bakst, a board certified psychiatrist and neurologist. CX 12 at 84-90. Dr. Bakst noted in his report that the claimant had no prior similar injuries. During the examination, the claimant complained of back pain, with radiating right lower extremity pain, and associated numbness, as well as similar symptoms on the left side of a lesser degree. Dr. Bakst noted the claimant's reports that his symptoms increased after standing, walking, or sitting for prolonged periods. Based on a review of medical records, a physical examination, and diagnostic tests, Dr. Bakst assessed the claimant's back condition as "remarkable for a positive root tension sign on the right, and weakness secondary to pain," as well as "acute and chronic denervation" both on the right and the left, and "most prominent in the right L5 distribution." Dr. Bakst recommended further evaluation and management and opined that surgery should be considered.

On September 25, 2001, Dr. Levine prepared an additional report on the claimant's condition. CX 10 at 71-88. Dr. Levine based his report on a review of medical records and his physical examination of the claimant on May 24, 2001, June 26, 2001, July 31, 2001, and August 30, 2001. Dr. Levine summarized the previous visits and the claimant's continued symptoms of back pain, limited motion, and pain extending down into his right leg. Dr. Levine concluded that the claimant's condition was permanent and stationary and that the claimant's overall level of disability was "equivalent to a disability resulting in limitations to do semi-sedentary work." Specifically, Dr. Levine found that the claimant could work "half the time" in a standing or walking position and the other half in a sitting position, with "minimum of demands for physical effort whether standing, walking or sitting."

By letter dated May 10, 2002, in response to employer's counsel, Dr. Dodge opined:

> [C]ertainly prior to December 7, 1999 this gentleman had [a] pre-existing disability. This was the result of a herniated disc which caused his symptoms in his back and limitations in his back prior to December 7, 1999. It is my medical opinion that the patient's current disability is materially and substantially greater today as a result of his pre-existent disability prior to December 7, 1999.

EX 8 at 152.

On May 22, 2002, Dr. Levine prepared a report on the claimant's back condition. CX 10 at 79-82. Dr. Levine stated that he had examined the claimant on December 13, 2001 and again on May 10, 2002. Dr. Levine summarized the claimant's continued back symptoms, including low back pain, pain radiating to both lower extremities as far as the feet, numbness in his buttocks extending into his knees, and pain upon standing, walking, or sitting for extended periods. Dr. Levine opined that the claimant could sit up to four hours during a eight hour work day, while sitting for no more than thirty minutes at a time. The claimant would also need to use a corset and a cane while walking, Dr. Levine concluded, and would also need to sit or lie down after walking ten to fifteen minutes. In addition, Dr. Levine noted that the claimant's numerous medications[1] would affect the claimant's mental skills, and would preclude any position that required a high degree of concentration or repetitive work activity. CX 10 at 81.

As of July 23, 2002, the employer had paid to the claimant $60,794.11 in temporary total disability compensation. CX 2 at 2.

On July 28, 2002, the employer adjusted the rate of compensation paid to the claimant. EX 9 at 154. As of this date, the claimant had received $60,794.11 in temporary total disability compensation.

On August 19, 2002, the employer submitted an application for Special Fund relief under Section 8(f) of the Act. EX 4 at 126-29.

On October 1, 2002, the claimant was referred for a comprehensive pain management consultation with Dr. Michael Moon, a board certified pain management specialist. CX 20 at 164-69, CX 22 at 170. Dr. Moon reviewed the claimant's history, Dr. Levine's May 22, 2002 report, the claimant's March 13, 2001 MRI scan, and he performed a physical examination. During the examination, the claimant reported constant aching low back pain with stabbing sensations when he moved, pain radiating to the right buttocks and both thighs, increased pain in the mornings and increased radiation into his heels with prolonged standing. Dr. Moon opined that the claimant suffered from "chronic low back pain that is discogenic with symptoms of radiculopathy." CX 20 at

[1]Dr. Levine stated that the claimant's medications included Darvocet for pain, Ibuprofen as an anti-inflammatory, Actos for diabetes, Ambien for sleep and Zoloft. CX 10 at 81.

168. Dr. Moon recommended either a full series of lumbar epidural steroid injections or chronic narcotic therapy. Dr. Moon also noted that the claimant should consider muscle relaxants for his back pain and a trial of anti-epileptic drugs for his radicular pain.

On October 15, 2002, the claimant requested authorization from the employer to receive epidural injections. CX 22 at 172.

On October 18, 2002, Dr. Dodge examined the claimant and prepared a report. EX 14 at 194-211. During the examination, the claimant complained of low back pain and right leg pain. Based on the examination and a review of medical records, Dr. Dodge noted the claimant's primary diagnosis as a "[l]arge lumbar disc herniation, L4-5." EX 14 at 206. Dr. Dodge opined that the claimant reached a permanent and stationary status on September 25, 2001, per Dr. Levine.[2] *Id*. In addition, Dr. Dodge opined that the claimant's back condition corresponded to a thirteen percent impairment to the whole person under the Fifth Edition of the AMA Guidelines of Permanent Impairment. The claimant lost approximately one-half of his pre-injury capacity, Dr. Dodge concluded, for such activities as bending, stooping, lifting, pushing, pulling, climbing, and other activities requiring comparable physical effort. Dr. Dodge also concluded that the claimant was precluded from prolonged or constant standing and that he should be "nonweight-bearing for a period of three hours in the course of an eight-hour workday." Dr. Dodge did not state an opinion regarding the effects of medications on the claimant ability to perform work. EX 14 at 207.

On November 18, 2002, the claimant testified at trial. Tr. at 23-52. The claimant testified that he experiences a considerable amount of pain symptoms that would preclude him from finding work.

On April 29, 2003, the employer deposed Dr. Dodge. EX 16 at 1-22. Dr. Dodge testified that the claimant had a documented pre-existing disk herniation at L4-5 which put him at risk for re-injury and that his December 7, 1999 injury was materially and substantially greater because of this pre-existing condition. EX 16 at 10-11. Dr. Dodge also testified that the claimant's first injury in 1995 precluded him from very heavy work, whereas his current injury of December 7, 1999 precluded him from heavy work and prolonged standing. EX 16 at 11, 15. In addition, Dr. Dodge agreed with Dr. Levine's permanent and stationary date of September 25, 2001[3] for claimant's back condition. EX 16 at 14. Dr. Dodge also testified that he believed that the claimant's pain complaints to be credible and the claimant's injury to be legitimate. EX 16 at 16, 19.

On April 29, 2003, the employer also deposed Kelly Jon Coyne, the employer's manager of safety and medical services. EX 15 at 1-35. Prior to his deposition, Mr. Coyne reviewed the claimant's personnel files, excerpts of which were attached to the deposition transcript as an exhibit. EX 15 at 6. Mr. Coyne testified as to the claimant's employment history. In particular, Mr. Coyne

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[2]September 25, 2001 was the report date for the examination date of August 30, 2001. CX 10, p.71, 75.

[3]See footnote 2 above.

testified that at the time of the claimant's injury the claimant was employed as a journeyman leadman in the mechanical services department. In 1994, however, the claimant worked as a foreman in the facilities department, a position which paid more than the position at the time of his injury. In 1995, the claimant was transferred to the mechanical services department, and later promoted to foreman on October 20, 1995. EX 15 at 13-14. In September 1998, however, the claimant was disciplined by the employer and demoted from foreman to leadman. EX 15 at 14.

Mr. Coyne also testified that workers for the employer can experience fluctuations in their earnings based on the amount of work available at the employer's facility during any particular period. EX 15 at 20. The number of hours available to pipefitters, Mr. Coyne estimated, had dropped from 2.5 million to 2.6 million man hours a year in 1999 to 2 million man hours in 2002, and is projected to decrease further in 2003. EX 15 at 17-18. Mr. Coyne also testified that the employer is giving more pipefitter work to outside contractors. EX 15 at 19-20. Mr. Coyne testified that the claimant was less vulnerable to layoffs than other employees, nevertheless, and that the claimant had been laid off only one time. Mr. Coyne conceded that the claimant historically worked significant amounts of overtime. Agreeing with a October 24, 2002 newspaper article, attached as an exhibit, Mr. Coyne also conceded that new federal spending might increase the availability of work at the employer's facility. EX 15 at 25-28.

Vocational Evidence

On January 29, 2001 the claimant was referred for vocational rehabilitation to Morgan & Tidwell Rehabilitation Consultants, by Linda MaGee-Jones, RS, of the OWCP longshore division in Long Beach, California. EX 2, p.56. After contacting the claimant, rehabilitation counselor Linda C. Tidwell placed the claimant's file in an "interrupted status," because the claimant was experiencing "ongoing discomfort and low tolerance for daily activity," and might need additional surgery. *Id*. at 47. The claimant's file was closed on August 3, 2001 because he was temporarily totally disabled and surgery was still being discussed with Dr. Levinee. *Id*. at 64.

On August 17, 2001, while the claimant was still in a temporary disability status, Dr. Levine sent Ms. Tidwell a form outlining the claimant's work restrictions. EX 2 at 66. Besides limiting the frequency of nine different physical activities, Dr. Levine restricted the claimant from working an eight-hour day, reaching or working above the shoulder, and lifting more than twenty pounds.

On September 25, 2001, Dr. Levine prepared an additional report on the claimant's condition. CX 10 at 71-88. Dr. Levine based his report on a review of medical records and his physical examination of the claimant on May 24, 2001, June 26, 2001, July 31, 2001, and August 30, 2001. Dr. Levine summarized the previous visits and the claimant's continued symptoms of back pain, limited motion, and pain extending down into his right leg. Dr. Levine concluded that the claimant's condition was permanent and stationary and that the claimant's overall level of disability was "equivalent to a disability resulting in limitations to do semi-sedentary work." Specifically, Dr. Levine found that the claimant could work "half the time" in a standing or walking position and the other half in a sitting position, with "minimum of demands for physical effort whether standing, walking or

sitting." This report was received by Ms. Tidwell. EX 2 at 87. On October 10, 2001, the claimant's file was re-activated and the counseling process re-commenced. *Id*. At the initial meeting, the claimant indicated he was having a good day, but he was unsure whether he would be able to work on a full-time basis, due to variable levels of stamina and pain. The following week the claimant told Ms. Tidwell he had not been feeling well and had decreased his daily activities. However, he had participated in a 2-day work capacities evaluation. *Id*. at 92.

Ms. Tidwell records receipt of the work capacities evaluation:

> I received a copy of the Sharp Occupational Performance Center Functional Capacity Evaluation dated 11/7/01 from Mr. Gene Bruno outlining Mr. Beckwith's participation in the evaluation on 11/5/01 and 11/6/01. In summary, Mr. Beckwith was noted to put forth his full cooperation and effort throughout the 2-day testing period. He had described an increase in discomfort on day two, however, he described this discomfort as remaining in the midrange (discomfort remaining in the 5 to 6 level with 0 being no pain and 10 being the most pain imaginable). He was able to sit continuously for 40 minutes without increased discomfort and was able to stand for 15 minutes before needing to sit. He was able to reach horizontally and vertically with no difficulty. He demonstrated manual dexterity, as well as the use of small and medium hand tools in the average to above average range. He was able to lift 15 lbs. from floor to waist and 10 lbs. from waist to overhead. The evaluator felt Mr. Beckwith demonstrated the ability to work on at least a part time basis and possibly a full time basis performing bench-type work.

EX 2, p.97.

On November 28, 2001, Ms. Tidwell met with the claimant in her office. The claimant told her he had participated in a deposition the day before and had been seated throughout with intermittent breaks. He told her it had been very painful and he was still experiencing increased discomfort. He stated he did not fell his pain was related to fatigue or stamina but to some physical anomaly in his back. He stated his pain is persistent and severe. EX 2 at 98.

On December 3, 2001, the claimant met with Ms. Tidwell again. He told her he was in a great deal of pain and that if he had been working he would have had to call in sick.

On January 25, 2002, Ms. Tidwell performed a labor market survey. EX 2 at 105-11. Ms. Tidwell found eighteen jobs as a customer service clerk or clerk in the San Diego area which, she concluded, were available and for which the claimant would be considered a qualified applicant at the conclusion of training. EX 2 at 108, 110.

On January 31, 2002, Ms. Tidwell spoke with the claimant in order to arrange for him to sign his rehabilitation plan. EX 2 at 114. The claimant informed her that he had been participating in classes at UEI and had "felt a little bit worse every day of the class." *Id*. He attributed his discomfort to both industrial and non-industrial factors which included high blood pressure, diabetes and depression. He had seen his doctor who prescribed medication for those conditions. He said he was

unable to concentrate in class and was very fatigued. He did not feel he could participate in rehabilitation. Ms. Tidwell closed the claimant's rehabilitation file on February 2, 2002.

On July 31, 2002, David Morgan, a vocational counselor from Morgan & Tidwell, prepared an additional Labor Market Survey Report. EX 11 at 156-81. Mr. Morgan reviewed medical reports from Dr. Levine, but not Dr. Levine's May 22, 2002 medical report in which he added a work restriction to limit jobs that did not require a high degree of concentration or repetitive work activity. CX 10, p.79-82. Apparently, Mr. Morgan was unaware of this work restriction when he performed his labor market survey. Mr. Morgan identified jobs that he considered available to the claimant: Parking Lot Attendant (7 positions), Information Clerk (7 positions), Surveillance System Monitor (10 positions), Security Guard (11 positions), Assembler-Small Products I (12 positions), and Assembler- Small Products II (8 positions). These positions paid hourly wages of between $6.50 and $11.00.

ANALYSIS

The claimant and the employer have stipulated: (1) the claimant suffered an injury arising out of and in the course of employment; (2) the place of injury was National City, California, and it occurred on December 7, 1999; (3) the claimant became aware that his disability was work-related on December 7, 1999; (3) this claim is for compensation and medical benefits, (4) the Act applies in this case; (5) at the time of the injury, an employer-employee relationship existed between the claimant and the employer; (6) disability commenced on December 13, 1999; (7) the claim was timely noticed and timely filed; (8) the claimant is entitled to compensation and medical benefits; (8) the employer/carrier is currently providing compensation and medical benefits; (9) the claimant reached the point of maximum medical improvement on August 30, 2001; (10) the claimant is not now working; (11) the injury is an unscheduled injury; (12) the claimant was temporarily totally disabled from December 13, 1999 through December 19, 1999, and on the individual days of December 22, 1999, January 6, 2000,[4] January 19, 2000, and from January 25, 2000 through August 30, 2001; (13) the claimant was permanently totally disabled beginning August 31, 2001 to January 25, 2002. Tr. at 4-6.

There are disputes between the parties concerning the following issues: (1) the claimant's average weekly wage, (2) the nature and extent of disability beginning January 26, 2002,(3) the employer's entitlement to Special Fund relief under Section 8(f). Findings concerning each of these issues are set forth below.

[4]This date as well as the January 19th and 25th dates have been corrected to the year "2000" rather than the year "1999" which is clearly an error. See EX 9.

Average Weekly Wage

Under Section 10 of the Act, there are three methods for determining the appropriate average weekly wage of an injured worker. These methods are set forth in Sections 10(a), 10(b), and 10(c). 33 U.S.C. § 910.

Section 10(a) applies when an injured worker worked in the same employment for "substantially the whole of the year" immediately preceding his or her injury. 33 U.S.C. § 910(a), *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir.1998). For five-day-a-week workers, the average weekly wage is calculated by: (1) dividing the total earnings of the claimant during the 52 weeks preceding the injury by the number of days actually worked, (2) multiplying that figure by 260, (3) dividing that figure by 52. *See* 33 U.S.C. § 910(a).

Section 10(b) applies when the injured worker was not employed substantially the whole of the year preceding the injury, but there is evidence in the record of wages of similarly situated employees who did work substantially the whole of the year. When neither Section 10(a) nor 10(b) can "reasonably and fairly be applied," Section 10(c) provides the general method for determining the appropriate average weekly wage. *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932). Section 10(c) does not prescribe a fixed formula but requires the judge to establish a figure that "shall reasonably represent the annual earning capacity" of the claimant. 33 U.S.C. § 910(c); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir.1998).

The Ninth Circuit Court of Appeals has repeatedly held that Section 10(a) presumptively applies where the claimant worked, during the previous 52 weeks, more than 75 percent of the 260 possible workdays, or 195 days. *See id.* at 1058, *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1343 (9th Cir.1982), vacated on other grounds, 462 U.S. 1101 (1983). The Ninth Circuit has acknowledged, however, that this benchmark is not necessarily determinative, since other circumstances might make applying Section 10(a) "unreasonable or unfair." *See Matulic*, 154 F.3d at 1058. The Benefits Review Board has held that 34.4 weeks or 172.5 days, constitutes substantially the whole of the year where the claimant's work is full-time, steady, or regular. *See Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990).

The claimant contends that his average weekly wage must be determined pursuant to the provisions of Section 10(c). In this regard, the claimant contends that his compensation rate should be calculated by averaging his earnings from the five years prior to 1999, but not the year 1999. The claimant's total earnings from these years is $243,603.42. Dividing by 5 years, this results in average earnings of $48,720.68[5] per year. This in turn results in an average weekly wage of $936.93 ($48,720.68 divided by 52 weeks) and a weekly compensation rate of $624.62 ($936.93 multiplied by 2/3). JX-1.

[5]In JX 1, the parties stipulated to the figure $47,720.68, which is a miscalculation. The court requires the parties to stipulate to the accuracy of mathematical calculations, in order to save court time. However, in this case, the court was required to expend additional time to correct the parties' mistake. The court would appreciate a more rigorous effort in future.

In contrast, the employer contends that the claimant's average weekly wage should be calculated under the Section 10(a) formula. The employer arrives at this rate by considering the 218 days that the claimant worked from December 8, 1998 to December 7, 1999 and the total wages earned during this period, $30,449.83. The employer then calculates the average daily rate to be $139.68 ($30,449.83 divided by 218 days). Then the employer assumes that 52 weeks consists of 260 possible work days (52 weeks multiplied by 5 days per week). The average daily rate is multiplied by the possible work days to obtain annual earnings of $36,316.31 ($139.68 multiplied by 260 possible work days). The annual earnings are then divided by 52 weeks to obtain an average weekly wage of $698.39 ($36,316.31 divided by 52 weeks). ALJX 2, p.1.

The claimant's earnings have varied considerably between the years 1990 through 2000. The claimant's total yearly earnings are: $38,642.20 in 1990, $42,119.74 in 1991, $39,408.71 in 1992, $37,280.53 in 1993, $45,423.16 in 1994, $36,733.97 in 1995, $61,808.96 in 1996, $52,335.70 in 1997, $47,301.63 in 1998, $30,229.81 in 1999, and $3,031.64 in 2000. CX 3 at 3. The claimant did not work from April 26, 1999 through June 6, 1999 because of a hernia injury. CX 4 at 4. Based on this injury, the claimant received temporary total disability compensation for 5.286 weeks at the weekly rate of $580.62, amounting to $3,068.99. CX 4 at 4. The claimant also took a voluntary leave of absence in 1999 of approximately two months. Tr. at 33.

After considering the claimant's circumstances, I find that the claimant's average weekly wage must be calculated according to Section 10(a) as contended by the employer. There are three reasons for this conclusion.

First, I find that the claimant worked substantially the whole of the year in the 52 weeks before his injury. The claimant worked 218 out of a possible 260 days, nearly 84 percent of the possible work days that year. This exceeds the presumptive number of days set forth by the Ninth Circuit and the required number of days set forth by the Board. Moreover, the claimant missed less than six weeks because of his hernia injury, and only two months while taking a voluntary leave of absence. These missed days do not preclude a finding that the claimant maintained regular, steady, and full time employment during the rest of the year.

Second, in applying this standard, I am mindful that the claimant did not work every possible work day. Nevertheless, the Section 10(a) calculation already contemplates that workers will not work on every possible work day. *See Duncanson -Harrelson*, 686 F.2d at 1342 ("Congress . . . was aware that virtually no one in the country works every working day of every week; there are many reasons including illness, vacations, strikes, unemployment, family emergencies, etc."); *Duncan*, 24 BRBS at 135 (Section 10(a) does not deduct from the calculation "time lost due to strikes, personal business, illness or other reasons."). The claimant's non-worked days are accounted for in the Section 10(a) calculation since his average daily wage is multiplied by 260, the maximum possible days he could have worked.

Third, the evidence regarding the availability of work for pipefitters is ambiguous and I make no finding as to whether the claimant would have been offered fewer hours in the future. One reason for the claimant's lower wages in 1999, however, was the claimant's 1998 disciplinary demotion from foreman to lead man.

I therefore find that the fairest and most reasonable estimation of the claimant's average weekly wage is the method provided for by Section 10(a). The employer's calculation is accurate and follows the correct procedure under the section. Consequently, I conclude that the claimant's average weekly wage at the time of injury was $698.39, which yields a compensation rate of $465.60.

Nature and Extent of Disability

Unscheduled injuries are governed by the provisions of Section 8(c)(21) of the Act. This section provides that compensation for such injuries should be based on the difference between the worker's pre-injury average weekly wage and his or her post-injury earning capacity.

In cases involving disputes over an injured worker's ability to return to work, the burden is initially on the claimant to show that he or she cannot return to his or her regular employment due to a work-related injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980); *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). If the claimant meets this burden, the employer must then establish the existence of specific and realistically available job opportunities within the geographic area where the employee resides which a person with the employee's technical and verbal skills is capable of performing. In determining if such job opportunities are realistically available, it is necessary to consider whether there exists a reasonable likelihood, given the claimant's age, education and background, that the claimant would be hired if he or she diligently sought the job. *See Hairston v. Todd Shipyards*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Stevens v. Director, OWCP*, 909 F.2d 1256, 1258 (9th Cir. 1990).

The employer does not contend that the claimant can return to his regular employment and the clear weight of the evidence supports a finding that the claimant is unable to meet the physical demands of his pre-injury job. In an effort to establish that he is unable to return to any other type of employment, the claimant relies on his own testimony, the reports of Dr. Levine, the report of Dr. Moon, and the reports and the deposition testimony of Dr. Dodge. *See* Tr. at 23-52 (trial testimony of the claimant), CX 10 at 61-69 (reports of Dr. Levine), CX 20 (report of Dr. Moon), CX 9, EX 8, EX 14 (reports of Dr. Dodge), and EX 16 (April 29, 2003 deposition testimony of Dr Dodge).

In an effort to establish that the claimant is able to perform suitable alternate employment, the employer relies on the reports of Ms. Tidwell and Mr. Morgan. *See* EX 2 at 105-11, EX 11 at 156-81.

After reviewing all of the relevant evidence, I find that the claimant is unable to perform suitable alternate employment and that consequently he is permanently totally disabled. There are three reasons for this conclusion.

First, the claimant offered credible testimony that he suffers from debilitating chronic back pain and related symptoms. At trial, the claimant testified that he experiences "constant pain" in his back and buttocks, numbness that radiates from his buttocks down to his knees in both legs, and down to his heel in his right leg. Tr 29. In order to get relief from his pain, the claimant testified, he lays down two or three times a day for approximately one hour. *Id*. The claimant also testified that he requires a cane and a corset in order to walk. Tr 30. The claimant testified that when he cooks for himself, he experience so much pain and leg numbness that he has to rest before eating the meal. Tr 37. The claimant's pain and pain medications, he testified, interfere with his ability to concentrate, which he blamed for his inability to complete computer classes during his vocational rehabilitation efforts. Tr 30-31. While Dr. Dodge did not review the claimant's trial testimony, Dr. Dodge testified at his deposition that he believed that the claimant's pain complaints were credible and that the claimant's injury was legitimate.

Second, the claimant's treating physicians have recommended restrictions on the claimant's physical activities that would prevent the claimant from any of the suggested jobs. There is no medical evidence which contradicts the reports of these physicians or any other reason to discount their opinions.

Dr. Levine concluded that the claimant's overall level of disability was "equivalent to a disability resulting in limitations to do semi-sedentary work." Specifically, Dr. Levine found that the claimant could work "half the time" in a standing or walking position and the other half in a sitting position, with "minimum of demands for physical effort whether standing, walking or sitting." Similarly, Dr. Levine opined that the claimant could sit for only four hours during a eight hour work day, while sitting for no more than thirty minutes at a time. The claimant would also need to use a corset and a cane while walking, Dr. Levine reported, and would need to sit or lie down after walking ten to fifteen minutes. Significantly, Dr. Levine noted that the claimant's numerous medications would affect the claimant's mental skills, and would preclude any position that required a high degree of concentration or repetitive work activity.

Pain specialist Dr. Moon also opined that the claimant credibly suffered from "chronic low back pain, " and he recommended either a full series of lumbar epidural steroid injections or chronic narcotic therapy, as well as muscle relaxants.

Dr. Dodge's numerous reports also support a finding that the claimant suffers from significant chronic back pain. While he did not state an opinion regarding the effects of medications on the claimant's ability to perform work, Dr. Dodge concluded that the claimant was precluded from prolonged or constant standing and that he should be "nonweight-bearing for a period of three hours in the course of an eight-hour workday."

Third, the reports of Ms. Tidwell and Mr. Morgan do not describe available jobs that would satisfy the claimant's restrictions.

In her January 25, 2002 labor market survey, Ms. Tidwell found ten employers in the San Diego area hiring for twelve customer service clerk positions, with wages ranging from $8.00 to $12.00 per hour. The physical demands, Mr. Tidwell reported, were primarily sedentary with "opportunities to stand or walk throughout the shift." She noted that the claimant would be a qualified applicant for these openings after completing training and that, according to the 2001 Job Occupational Outlook, the claimant would have little competition in obtaining one of these jobs despite his lack of experience in this field. In addition, Ms. Tidwell found eight openings for clerk positions in the San Diego area, with wages ranging from $8.00 to $11.00 per hour. The physical demands, Ms. Tidwell again reported, were sedentary with "opportunities to stand/walk throughout the shift." She also noted that an "[i]njured worker would be considered a qualified applicant for these jobs at the conclusion of training." For the clerk position, Ms. Tidwell reported that applicants face a very competitive job search. For neither the clerk positions nor the customer service clerk positions did Ms. Tidwell describe, specifically, what additional training would be required. Moreover, it is clear the claimant did not possess such training, nor was he able to participate in vocational rehabilitation, both for industrial and non-industrial health related reasons, in order to obtain such training. His one attempt to participate in a class on computers failed because of the effect of back pain on his concentration. Tr 30-31. Thus, the claimant is not qualified for any of these positions.

In his July 31, 2002 labor market survey, Mr. Morgan identified jobs that he considered available to the claimant: Parking Lot Attendant (7 positions), Information Clerk (7 positions), Surveillance System Monitor (10 positions), Security Guard (11 positions), Assembler-Small Products I (12 positions), and Assembler- Small Products II (8 positions). These positions paid hourly wages of between $6.50 and $11.00. However, Mr. Morgan only reviewed Dr. Levine's medical reports dated September 25, 2001, December 13, 2001 and February 6, 2002. EX 11, p.156-57. He did not see Dr. Levine's report dated May 22, 2002, in which Dr. Levine stated that the claimant would need to sit or lie down after walking 10 to 15 minutes, and due to his numerous medications, would be precluded from any position which required a high degree of concentration or repetitive work activity. CX 10, p.79-82.

After carefully reviewing the entirety of both vocational reports, I find that none of the described jobs would be acceptable for the claimant given his work restrictions. The jobs Ms. Tidwell surveyed require specialized training, which the claimant does not have. The jobs Mr. Morgan surveyed were not examined to see if they would accept the claimant's need to sit or lie down after walking for 10 to 15 minutes, and his need to work at a job which does not require a high degree of concentration or repetition. In addition, those jobs classified as "light work" require: "1) walking or standing to a significant degree; 2) sitting most of the time while pushing or pulling arm controls; or 3) working at a production rate pace while constantly pushing or pulling arm or leg controls. . . ." Even the jobs classified as sedentary work require "sitting most of the time" and "*may*" allow for walking and standing for "*brief periods.*" (Emphasis added). None of the positions would likely allow the claimant to sit for half of an eight-hour work day, and at the same time, allow the claimant

to take a break from sitting every thirty minutes. Similarly, none of the positions would likely allow the claimant to stand or walk for half of the day, and also allow the claimant to sit or lie down after walking for ten to fifteen minutes. Many, if not all of the positions would require a high degree of concentration or repetitive work activity. The claimant's pain symptoms and pain medication would prevent the claimant from performing these mentally challenging jobs, a finding that is supported by the reports of Dr. Levine and the credible testimony of the claimant.

Employer's Entitlement to Special Fund Relief

In order to obtain relief from the Special Fund under Section 8(f) of the Act the employer must show: (1) that the claimant had a permanent partial disability prior to his work-related injury, (2) that the pre-existing disability was manifest prior to that injury, and (3) that the pre-existing disability contributed to the claimant's ultimate permanent disability in the specific manner prescribed in the Act. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982). For the reasons set forth below, I find that while the employer satisfied the requirement that there be a pre-existing permanent partial disability, and that it be manifest, it did not present evidence sufficient to satisfy the contribution requirement. Therefore, I must find that the employer is not entitled to Section 8(f) relief.

1. Existence of a Pre-Existing Permanent Partial Disability.

As noted, the first of the three requirements for obtaining Section 8(f) relief is a showing by the employer that prior to the claimant's work-related injury the claimant had a pre-existing permanent partial disability. Such a pre-existing disability, however, need not be economically disabling or require medical treatment in order to constitute a permanent partial disability within the meaning of Section 8(f). *See C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513 (D.C. Cir. 1977); *Director, OWCP v. Campbell Industries, Inc., supra.* S*ee also Todd Pacific Shipyards v. Director, OWCP*, 913 F.2d 1426 (9th Cir. 1990); *Currie v. Cooper Stevedoring Co.*, 23 BRBS 420, 426 (1990). Rather, it is sufficient to show that, "because of a greatly increased risk of employment related accident and compensation liability," the pre-existing condition would motivate a cautious employer to discharge or refrain from hiring the employee. *See C&P Telephone Co. v. Director, OWCP, supra.*

In this case, the claimant suffered from a pre-existing lumbosacral strain and disc herniation at L4-5. This diagnosis is set forth in the undisputed reports of Dr. Dodge and Dr. Macarian. *See* CX 13 at 91-95 (January 8, 1999 report of Dr. Dodge) and CX 14 at 96-107 (January 22, 1996 report of Dr. Macarian). *See also* CX 15 at 108-09 (January 22, 1996 MRI scan). Based on this condition, the claimant received temporary total disability compensation and returned to work with restrictions against "very heavy work." CX 13 at 94.

I find it to be more likely than not that a cautious employer would be motivated to discharge a person with such a condition due to a fear of potential workers' compensation liability. *See Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143 (9th Cir. 1991) (finding that comparable

medical evidence was sufficient to show the existence of a pre-existing permanent partial disability). Accordingly, I find that the first prerequisite for Section 8(f) relief has been met.

2. Evidence Disability Was Manifest.

The second requirement for Section 8(f) relief is a showing that the claimant's pre-existing disability was "manifest" to the employer prior to the subsequent injury. *See Director, OWCP v. Cargill, Inc.*, 709 F.2d 616 (9th Cir. 1983). This requirement can be met by showing either that the employer had actual knowledge of the condition or that there were medical records in existence prior to the subsequent injury from which the claimant's condition was objectively determinable. *See Todd v. Todd Shipyards Corp.*, 16 BRBS 163 (1984). The medical records need not indicate the precise nature of the pre-existing condition, including its permanency, so long as they contain information regarding the existence of a serious lasting problem that would motivate a cautious employer to consider terminating the employee because of the risk of future compensation liability. *See Lockhart v. General Dynamics Corp.*, 20 BRBS 219, 225 (1988), *aff'd sub. nom Director, OWCP v. General Dynamics*, 980 F.2d 74 (1st Cir. 1992). In addition, the records do not have to show that the condition was symptomatic or that the condition would actually impair a person's ability to work. *See Director, OWCP v. Berkstresser*, 921 F.2d 306, 310 (D.C. Cir. 1991).

In this case, the claimant's condition was documented by the reports of Dr. Dodge and Dr. Macarian. *See* CX 13 at 91-95 (January 8, 1999 report of Dr. Dodge) and CX 14 at 96-107 (January 22, 1996 report of Dr. Macarian). Moreover, the employer had actual knowledge of the pre-existing condition because the claimant was working for the employer at the time of his first injury and the employer paid temporary total disability compensation. EX 6, p.138.

Hence, I find that the second requirement for Section 8(f) relief has also been met.

3. Contribution to the Ultimate Permanent Disability.

The third requirement for obtaining Section 8(f) relief is proof that the pre-existing disability contributed to the claimant's ultimate permanent disability in the manner prescribed by the Act. There are two aspects of this requirement. First, the employer must establish that the ultimate disability is not due solely to the subsequent injury, regardless of whether the ultimate permanent disability is either partial or total. *See* 20 C.F.R. §702.321(a)(1)(iv). In interpreting this requirement, the courts have held that even if a claimant's pre-existing disability combined with a work-related injury to create a greater disability than the work-related injury would have caused by itself, Section 8(f) relief is still precluded if the work-related injury alone would have been totally disabling. *See FMC Corp. v. Director, OWCP*, 886 F.2d 1185 (9th Cir. 1989); *Director, OWCP v. Luccitelli*, 964 F.2d 1303 (2nd Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748 (5th Cir. 1990). Second, when an ultimate permanent disability is only partial rather than total, the employer must also establish that the disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. *See* 20 C.F.R. §702.321(a)(1). In order to determine whether this requirement has been satisfied, a fact finder must consider what level of disability would have resulted from a claimant's work-related injury if the claimant had not already had a pre-existing disability at

the time of the injury. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 8 F.3d 175, 185 (4th Cir. 1993)*(Harcum I)*; *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Carmines)*, 138 F.3d 134 (4th Cir. 1998).

The *Harcum I* Court stated:

> To satisfy this additional prong of the contribution element, the employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the [current] work-related injury alone. A showing of this kind requires quantification of the level of impairment that would ensue from the work- related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes the level of disability in the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater.

8 F.3d at 185-186.

The issue is thus whether the employer has submitted sufficient evidence that the claimant's current injury alone would not have been sufficient to cause his current level of disability and that his pre-existing condition has made his present disability materially and substantially greater than it would have been standing alone. The employer argues that it has submitted such evidence. The Director, OWCP, disagrees and states that

> the claimant's injury of December 7, 1999, and the two unsuccessful back surgeries were sufficient to have resulted in the claimant's current level of disability and . . . a medical opinion stating the contribution language without a rationale is insufficient to meet the contribution criteria for Section 8(f) relief.

ALJX 6, p.2.

After reviewing all the evidence submitted by the employer in support of this contention, the undersigned finds that the burden has not been met.

In an attempt to show that the contribution requirement has been satisfied, the employer presented the report of Dr. Han, and the reports and deposition testimony of Dr. Dodge. *See* CX 8 at 12 (report of Dr. Han) CX 9, EX 8, EX 14 (reports of Dr. Dodge), and EX 16 (April 29, 2003 deposition testimony of Dr Dodge).

In providing the initial treatment to the claimant's December 7, 1999 injury, Dr. Han noted the claimant's history of lower back strains and chronic symptoms related to that condition. On

December 10, 1999, Dr. Dodge noted the claimant's "documented pre-existent lumbar disc herniation at L4-5." CX 9 at 17. By letter dated May 10, 2002, in response to the employer's counsel, Dr. Dodge opined:

> [C]ertainly prior to December 7, 1999 this gentleman had [a] pre-existing disability. This was the result of a herniated disc which caused his symptoms in his back and limitations in his back prior to December 7, 1999. It is my medical opinion that the patient's current disability is materially and substantially greater today as a result of his pre-existent disability prior to December 7, 1999.

EX 8 at 152.

At his deposition, Dr. Dodge testified:

> I made [the] determination that [the claimant's] disability was materially and substantially greater because prior to December 7th, 1999 he did not have a normal back . . . And as a result of the injury of December 7th, 1999 he caused a further injury to his back. So I think his disability is greater because of that pre-existing condition.

EX 16 at 16.

While the employer cited doctors' opinions that the claimant's current back disability is materially and substantially greater due to his pre-existing back disability, no evidence was submitted to show that the current injury alone could not be responsible for the claimant's current level of disability. Thus, the employer has not sustained its burden under the contribution requirement, and I must find against it.

I conclude that the evidence submitted is insufficient to show that the contribution requirement has been satisfied and therefore further conclude that the employer is not entitled to Section 8(f) relief.

ORDER

1. The employer shall pay the claimant temporary total disability compensation for the period from December 13, 1999 through December 19, 1999, and on the individual days of December 22, 1999, January 6, 2000, January 19, 2000, and from January 25, 2000 through August 30, 2001, at the weekly compensation rate of $465.60.

2. Beginning on August 31, 2001 the employer shall pay the claimant permanent total disability compensation at the weekly compensation rate of $465.60.

3. The employer shall receive credit for all compensation paid to the claimant since December 7, 1999, including any compensation payments that exceed the amounts awarded in this Decision and Order.

4. The employer shall pay interest to the claimant on each unpaid installment of compensation from the date the compensation became due at rates determined by the District Director in accord with the following: The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date this decision and order is filed with the District Director. See 28 U.S.C. 1961.

5. The District Director shall make all calculations necessary to carry out this order.

6. The employer shall provide the claimant all medical care that may be reasonable and necessary for the treatment of the December 7, 1999 injury to the claimant's back.

7. The employer shall not be entitled to Special Fund Relief under Section 8(f) of the Act.

8. Counsel for the claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for the employer within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, the counsel for the employer shall initiate a verbal discussion with the counsel for the claimant in an effort to amicably resolve any dispute concerning the amounts requested. If the two counsel thereby agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, the counsel for the claimant shall within 30 calendar days after the date of service of the initial fee petition provide the undersigned and the counsel for the employer with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the counsel for the employer and shall set forth therein the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for the employer shall file a Statement of Final Objections and serve a copy on the counsel for the claimant. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge